International Covenant on Civil and Political Rights

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Human Rights Committee

Decision adopted by the Committee under the Optional Protocol, concerning communication No. 2166/2012*, **

Communication submitted by:	V.P. (not represented by counsel)
Alleged victim:	The author
State party:	Belarus
Date of communication:	27 May 2012 (initial submission)
Document references:	Decision taken pursuant to rule 97 of the Committee's rules of procedure, transmitted to the State party on 3 July 2012 (not issued in document form)
Date of adoption of decision:	6 April 2018
Subject matters:	Right to counsel of own choosing; effective remedy
Procedural issues:	Exhaustion of domestic remedies; State party's failure to cooperate
Substantive issues:	Fair trial — legal assistance; effective remedy
Articles of the Covenant:	14 (3) (b) and (d), read in conjunction with 2 (3) (b)
Articles of the Optional Protocol:	2 and 5 (2) (b)

1. The author of the communication is V.P., a national of Belarus born in 1969. He claims to be a victim of a violation by Belarus of his rights under article 14 (3) (b) and (d), read in conjunction with article 2 (3) (b), of the International Covenant on Civil and Political Rights. The Optional Protocol entered into force for Belarus on 30 December 1992. The author is unrepresented.

The facts as submitted by the author

2.1 On 16 March 2011, the author was summoned to a police station in the Soviet district of Gomel City, where the police requested to take his fingerprints using special ink. Fingerprinting was necessary because the law on State fingerprint registration provides for the mandatory registration of the fingerprints of all citizens liable for military service at a

* Adopted by the Committee at its 122nd session (12 March–6 April 2018).

** The following members of the Committee participated in the examination of the communication: Yadh Ben Achour, Ilze Brands Kehris, Ahmed Amin Fathalla, Olivier de Frouville, Christof Heyns, Yuji Iwasawa, Ivana Jelić, Bamariam Koita, Marcia V.J. Kran, Duncan Laki Muhumuza, Photini Pazartzis, Mauro Politi, José Manuel Santos Pais, Yuval Shany and Margo Waterval.

local police station. The author refused to have his fingerprints taken by that method, stating that he would not object if the police took his fingerprints using digital technology. He was charged with an administrative offence under article 23.4 of the Code of Administrative Offences, namely, refusing to obey the lawful demands of a police officer.

2.2 On 13 April 2011, the Soviet District Court found the author guilty of refusing to obey the lawful demands of a police officer (article 23.4 of the Code of Administrative Offences), and ordered him to pay a fine of 875,000 Belarusian roubles.[1]

2.3 During the court hearing, the author stated that he wished to be represented by S, who was a professional lawyer but not a member of the bar (a licensed advocate). The Court rejected his request on the basis of article 4.5, paragraph 2, of the Procedural-Executive Code of Administrative Offences, under which only close relatives or licensed advocates may represent defendants during administrative proceedings. The author notes in his submission that he could not afford to hire an advocate to represent him at his administrative hearing, and that he chose S to be his representative at the hearing because S had agreed to do so on an unpaid basis.

2.4 On 20 April 2011, the author filed a cassation appeal with Gomel Regional Court, in which he appealed against, inter alia, the refusal of the Soviet District Court to allow the counsel of his choice to represent him. He argued that article 62 of the Constitution of Belarus allowed for the use of representatives other than licensed advocates during all court proceedings, [2] and that, despite the fact that the Procedural-Executive Code of Administrative Offences did not allow for representation by non-advocates in administrative courts, the court had to decide on that issue from the point of view of the Constitution. The appeal was rejected on 11 May 2011. Subsequent requests for supervisory review filed with the Chair of Gomel Regional Court and the Chair of the Supreme Court were also rejected, on 26 August and 31 October 2011 respectively.

2.5 The author states that he did not submit a request for a supervisory review with the Prosecutor's Office, since he does not consider that process to be an effective remedy, and refers to the Committee's jurisprudence, which requires domestic remedies to be not only accessible, but also effective.[3]

The complaint

3.1 The author claims that article 4.5, paragraph 2, of the Procedural-Executive Code of Administrative Offences violated his rights to be defended by a counsel of his choice, to have adequate time and facilities for the preparation of his defence, and to communicate with counsel of his own choosing.

3.2 The author also claims that Belarus is obliged under article 2 (3) (b) of the Covenant to ensure that any person claiming a remedy for a violation of his or her rights under the Covenant is to have his or her right to such a remedy determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy. He claims that Belarus violated its obligation under that article by failing to ensure a remedy for the violations of his rights under article 14 (3) (b) and (d) of the Covenant.

State party's observations on admissibility

4.1 The State party submitted observations in a note verbale dated 25 July 2012. In the note verbale, the State party contends that the author's communication lacks legal grounds for consideration both on admissibility and the merits. It argues that the author has not

[1] Approximately €220 at that time.

[2] Article 62 of the Constitution states that everyone is to have the right to legal assistance to exercise and defend his or her rights and freedoms, including the right to make use, at any time, of the assistance of advocates and other representatives in court, State bodies, local government bodies, enterprises, establishments, organizations and public associations, and also in relations with officials and citizens, that, in the instances specified in law, legal assistance is to be provided from public funds, and that opposition to the provision of legal assistance is prohibited in Belarus.

[3] See *Levinov v. Belarus* (CCPR/C/102/D/1812/2008).

exhausted all available domestic remedies because he did not submit an appeal against the judicial decision to the Prosecutor General under the supervisory review proceedings. Moreover, he had the right to submit a complaint to the Chair of the Supreme Court after his appeal had been rejected by the Deputy Chair of the Supreme Court. Thus, his complaint has been registered in violation of article 2 of the Optional Protocol.

4.2 The State party submitted that it had discontinued proceedings regarding the present communication and would disassociate itself from the Views that might be adopted by the Committee.

Author's comments on the State party's observations

5.1 In a letter dated 28 August 2012, the author responded to the observations of the State party. He submits that, under the Committee's standards, legal remedies should be not only accessible, but also effective. He reiterates that he has not appealed for a supervisory review to the General Prosecutor's Office or the Chair of the Supreme Court, because he does not consider that such an appeal constitutes an effective legal remedy. He submits that, according to the Committee's practice, an effective remedy is one that can provide the author with compensation and offer him a reasonable prospect of redress. The author refers to the Committee's consistent jurisprudence that supervisory review is a discretionary review process, limited to issues of legality, which the Committee considers not to constitute an effective remedy for the purposes of exhaustion of domestic remedies.

5.2 Moreover, with respect to the right to submit his complaint to the Chair of the Supreme Court, the author states that his original complaint was actually addressed to that official and that the fact that the Deputy Chair of the Supreme Court reviewed his case instead shows the ineffectiveness of the supervisory review as a domestic remedy.

5.3 The author further states that administrative decisions can only be appealed against within six months of the date on which they are issued and that it is practically impossible to appeal to all judicial bodies and the General Prosecutor's Office within that time frame.

5.4 As for the arguments referring to the competence of the Committee to consider the communication, the author submits that, by becoming a State party to the Optional Protocol, Belarus recognized not only the Committee's competence to issue decisions regarding the existence or absence of violations of the Covenant but also, in accordance with article 40 (4) of the Covenant, to transmit its reports, and such general comments as it may consider appropriate, to the States parties. Under article 2 of the Covenant, the State party is also obliged to ensure that any person within its territory and subject to its jurisdiction has an effective remedy should his or her rights under the Covenant be violated. The role of the Committee ultimately includes interpreting the provisions of the Covenant and developing jurisprudence. By refusing to recognize the standard practices, methods of work and precedents of the Committee, Belarus in effect refuses to recognize its competence to interpret the Covenant, which contradicts the objective and goals of the Covenant.

5.5 The author submits that, having voluntarily accepted the jurisdiction of the Committee, the State party has no right to infringe on its competence and ignore its opinion. The State party is obliged not only to implement the decisions of the Committee, but also to recognize its standards, practices, methods of work and precedents. The above argument is based on the most important principle of international law, *pacta sunt servanda*, according to which every treaty in force is binding upon the parties to it and must be observed by them in good faith.

Issues and proceedings before the Committee

Lack of cooperation by the State party

6.1 The Committee notes the State party's assertion that there are no legal grounds for the consideration of the author's communication, insofar as it was registered in violation of the provisions of the Optional Protocol, and that, if a decision is taken by the Committee on the present communication, its authorities will "disassociate" themselves from the Committee's Views.

6.2 The Committee observes that, by adhering to the Optional Protocol, a State party to the Covenant recognizes the competence of the Committee to receive and consider communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant (preamble and art. 1). Implicit in a State's adherence to the Optional Protocol is an undertaking to cooperate with the Committee in good faith so as to permit and enable it to consider such communications, and after examination thereof, to forward its Views to the State party and to the individual (art. 5 (1) and (4)). It is incompatible with those obligations for a State party to take any action that would prevent or frustrate the Committee in its consideration and examination of a communication and in the expression of its Views. It is for the Committee to determine whether a case should be registered. By failing to accept the competence of the Committee to determine whether a communication shall be registered and by declaring outright that it will not accept the Committee's determination of the admissibility and of the merits of the communications, the State party has violated its obligations under article 1 of the Optional Protocol.[4]

Consideration of admissibility

7.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 93 of its rules of procedure, whether the communication is admissible under the Optional Protocol.

7.2 The Committee has ascertained, as required under article 5 (2) (a) of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

7.3 The Committee notes the State party's assertion that the author has failed to request the Chair of the Supreme Court and the Prosecutor General's Office to initiate a supervisory review of the decisions of the domestic courts. The Committee also takes note of the author's claim that he did request the Chair of the Supreme Court to initiate the supervisory review of the decisions of the lower courts, but that his request was handled by the Deputy Chair of the Supreme Court. The Committee recalls its jurisprudence, according to which a petition to a prosecutor's office requesting a review of court decisions that have taken effect does not constitute a remedy that has to be exhausted for the purposes of article 5 (2) (b) of the Optional Protocol.[5] It also recalls its jurisprudence that requests for supervisory review to the chair of a court directed against court decisions that have entered into force and that depend on the discretionary power of a judge constitute an extraordinary remedy, and that the State party must show that there is a reasonable prospect that such requests would provide an effective remedy in the circumstances of the case.[6] In the present case, the Committee notes that the State party has not provided any further information as to the effectiveness of the supervisory review process. Accordingly, the Committee considers that it is not precluded by article 5 (2) (b) of the Optional Protocol from examining the present communication.

7.4 The Committee takes note of the author's submission that the State party violated its obligations under article 2 (2), read in conjunction with article 14 (3) (b) and (d) of the Covenant. The Committee considers that the provisions of article 2 cannot be invoked in a claim in a communication under the Optional Protocol in conjunction with other provisions of the Covenant, except when the failure by the State party to observe its obligations under article 2 is the proximate cause of a distinct violation of the Covenant directly affecting the individual claiming to be a victim.[7] In the case at hand, the Committee considers that the

[4] See, for example, *Levinov v. Belarus* (CCPR/C/105/D/1867/2009, 1936, 1975, 1977-1981, 2010/2010), para. 8.2; and *Poplavny v. Belarus* (CCPR/C/115/D/2019/2010), para. 6.2.

[5] See *Alekseev v. Russian Federation* (CCPR/C/109/D/1873/2009), para. 8.4; *Lozenko v. Belarus* (CCPR/C/112/D/1929/2010), para. 6.3; *Sudalenko v. Belarus* (CCPR/C/115/D/2016/2010), para. 7.3; and *Koreshkov v. Belarus* (CCPR/C/121/D/2168/2012), para. 7.3.

[6] See *Gelazauskas v. Lithuania* (CCPR/C/77/D/836/1998), para. 7.4; *Sekerko v. Belarus* (CCPR/C/109/D/1851/2008), para. 8.3; *Protsko and Tolchin v. Belarus* (CCPR/C/109/D/1919-1920/2009), para. 6.5; *Schumilin v. Belarus* (CCPR/C/105/D/1784/2008), para. 8.3; and *P.L. v. Belarus* (CCPR/C/102/D/1814/2008), para. 6.2.

[7] See *Poliakov v. Belarus* (CCPR/C/111/D/2030/2011), para. 7.4; and *Sudalenko v. Belarus* (CCPR/C/112/D/2114/2011), para. 8.4.

author had not sufficiently substantiated the claim that examination of the question of whether the State party violated its general obligations under article 2 (2), read in conjunction with article 14 (3) (b) and (d), would be distinct from examining a violation of the author's rights under article 14 (3) (b) and (d), read in conjunction with article 2 (3) (b), of the Covenant. Therefore, the Committee considers that the author's claims in that regard are incompatible with article 2 of the Covenant and thus inadmissible under article 3 of the Optional Protocol.

7.5 Next, the Committee must decide whether article 14 (3) of the Covenant is applicable in the present communication, that is, whether the sanctions in the author's case for refusal to obey the lawful demands of a police officer concerned "any criminal charge" within the meaning of the Covenant. In that regard, the Committee notes that article 23.4 of the Code of Administrative Offences includes as a sanction "administrative arrest" (i.e., detention). It further notes that the legal rules infringed by the author are directed not towards a given group possessing a special status, in the manner, for example, of disciplinary law, but towards anyone who, in his or her capacity as an individual, refuses to obey lawful orders given by the police. They prescribe conduct of a certain kind and make the resultant requirement subject to determination of guilt and a sanction that is punitive. In its jurisprudence,[8] the Committee has referred to paragraph 15 of its general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, in which it held that acts that were criminal in nature with sanctions that, regardless of their qualification in domestic law, must be regarded as penal because of their purpose, character or severity. Therefore, the general character of the rules and the purpose of the penalty, being both a deterrent and punitive, establish that the offence in question was, in terms of article 14 (3) of the Covenant, criminal in nature.

7.6 As to the author's claim that the State party violated its obligations under article 14 (3) (b) of the Covenant because he did not have adequate time and facilities for the preparation of his defence and could not communicate with counsel of his own choosing, the Committee observes that the author was not in detention and has not provided information that he was otherwise precluded from preparing for his court hearing with counsel of his own choosing. Since the author did not show exactly how his rights under article 14 (3) (b) were violated, and in the absence of any other pertinent information on file, the Committee finds that his claim under article 14 (3) (b) is insufficiently substantiated and is thus inadmissible under article 2 of the Optional Protocol.

7.7 With regard to the author's claim that the State party violated his right to defend himself through legal assistance of his own choosing, the Committee notes the author's allegation that the Procedural-Executive Code of Administrative Offences violates his right under 14 (3) (d) of the Covenant by restricting his right to legal assistance in administrative cases to only advocates and close relatives, while the Constitution of Belarus provides for the right to use advocates and other representatives in courts. However, the Committee observes that the author has not substantiated that this restriction is unreasonable. In the absence of any other pertinent information on file, the Committee finds that his claim under article 14 (3) (d) is insufficiently substantiated and thus inadmissible under article 2 of the Optional Protocol.

8. Therefore, the Human Rights Committee decides that:

(a) The communication is inadmissible pursuant to article 2 of the Optional Protocol;

(b) The present decision shall be communicated to the author and to the State party.

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[8] See *Osiyuk v. Belarus* (CCPR/C/96/D/1311/2004), paras. 7.3–7.4.